SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1059

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

vs.

LONG ISLAND LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Eastern District of New York

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Statement under rule XIII

This injunction action was commenced by complaint filed on December 19, 1944.

The parties are set forth in the above caption.

The motion of the plaintiff for a preliminary injunction was made before District Judge Harold M. Kennedy on December 19, 20, and 21, 1944.

No questions were referred to a commissioner, master or referee.

The order denying the preliminary injunction, which is the order appealed from, was after hearing and argument by counsel for the parties entered on December 21, 1944.

The appeal was taken on December 21, 1944.

2 In United States District Court

[Title omitted.]

Complaint for injunction

1. The Plaintiff, Securities and Exchange Commission (hereinafter referred to as the "Commission"), is an agency and instrumentality of the United States Government, created by Section 4 of the Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15 U. S. C., sec. 78a, et seq.), and is charged, among other things, with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., sec. 79a et seq., hereinafter referred to as the "Act"). The Act provides a comprehensive system for the regulation of the business of public utility holding companies, and the financial and corporate affairs of such companies and their subsidiaries, in accordance with the standards prescribed therein by Congress for the protection of the public, investors and consumers.

2. Long Island Lighting Company is a public utility holding company within the meaning of Section 2 (a) (7) (A) of the Act. It is a corporation organized under the laws of the State of New York, and has its principal place of business in Mineola, New York.

3. On November 7, 1935, Long Island Lighting Company filed

an application with the Commission for exemption from the Act pursuant to Section 3 (a) (1) thereof which, in substance, provides exemptions from the Act for predominantly intrastate holding companies "unless and except insofar as it (the Commission) finds the exemption detrimental to the public interest or the interest of investors or consumers". On May 27, 1936, the Commission
3 entered its findings and opinion and order granting said application. In its findings and opinion accompanying its order of March 27, 1936, the Commission stated:

"Section 3 (c) provides that the Commission shall revoke such order whenever it shall find that the circumstances which gave rise to its issuance no longer exist. The provisions of Section 1 (c) and 3 (d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing" (1 S. E. C. 345, 346 (1936)).

4. On November 4, 1944, a petition was filed with the Commission by a protective committee representing public holders of shares of the preferred stock of Long Island Lighting Company, seeking a reopening of the above proceedings under Section 3 (a). Said petition represented that since the date of the Commission's order of March 27, 1936, arrears had accumulated on the preferred stock of Long Island Lighting Company in the amount of more than $10,000,000; that the company was endeavoring to effectuate a recapitalization plan unfair to the preferred stockholders; and that the activities of the company in various respects burden interstate commerce and the means and instrumentalities of interstate commerce. The Commission entered an order on November 10, 1944 directing that a hearing be held pursuant to Sections 3 (a) and 3 (c) and 20 (a) of the Act, to determine whether the exemption of Long Island Lighting Company from the provisions of the Act is detrimental to the public interest or the interest of investors or consumers, and whether the Commission's order of March 27, 1936 should be revoked or in any wise amended or modified.

4 5. The Commission entered an order on November 21, 1944, instituting a proceeding under Section 2 (a) (7) (B) of the Act to determine whether Ellis L. Phillips, Empire Power Corporation, a New York corporation, Eastern Seaboard Securities Corporation, a Delaware corporation, and Lauridel Corporation, a Delaware corporation, or any one or more of them, directly or indirectly, exercise (either alone or pursuant to an understand-

ing with one or more other persons) such a controlling influence over the management or policies of Long Island Lighting Company as to make it necessary or appropriate for the public interest or for the protection of investors or consumers, that they, or any one or more of them, be subject to the obligations, duties and liabilities imposed in the Act, upon holding companies. By a subsequent order dated December 9, 1944, Delaware Olmsted Company, a Delaware corporation, was named an additional party respondent in said proceedings under Section 2 (a) (7) (B) of the Act. The said proceedings pursuant to Section 3 (a) of the Act and the proceedings pursuant to Section 2 (a) (7) (B) of the Act were consolidated by Commission order dated November 22, 1944, and the hearing in said consolidated proceedings was therein ordered to be convened on December 19, 1944 at ten o'clock in the forenoon, E. W. T., at the offices of the Commission in Philadelphia, Pennsylvania.

6. If the Commission should determine in the course of said proceedings pursuant to Section 3 (a) of the Act that the exemption granted to Long Island Lighting Company and the Commission's order of March 27, 1936 should be revoked or appropriately modified, or if it should be determined by the Commission in the course of said Section 2 (a) (7) (B) proceedings that any one or more of the respondents therein exercise such a controlling influence with respect to Long Island Lighting Company, a consequence would be that all significant financial transactions of Long Island Lighting Company, including such matters as the promulgation and effectuation of recapitalization plans and the issuance of securities, would be subject to the Commission's jurisdiction under the applicable standards of the Act.

7. Long Island Lighting Company has proposed a plan of recapitalization, readjusting certain of the rights of its preferred and common stockholders. In an opinion on the plan dated July 27, 1944, the Public Service Commission of the State of New York referred to numerous respects in which the plan was unfair to security holders and deficient in regard to the public interest. Said opinion further stated:

"It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?

"The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather

summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944, for at least eleven-sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly
6 claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years."

8. On December 15, 1944, said Public Service Commission entered an order authorizing the transactions necessary to the consummation of said plan. Two of the five members of the said Public Service Commission declined to vote on the entry of this order of that Commission on the ground that the aforesaid proceedings under the Public Utility Holding Company Act of 1935 concerning Long Island Lighting Company were pending before the Securities and Exchange Commission, and at a crucial stage.

9. There is serious doubt whether the said plan of recapitalization of the Long Island Lighting Company is fair and equitable to the persons affected thereby, and whether if it were presented to the Commission it would be found to meet the standards of the Act prescribed by Congress for the protection of investors. It is also doubtful, because of the unsatisfactory capitalization structure of the company, if the said plan were put into effect, that the plan could be found by the Commission to be in the public interest and for the interests of investors or consumers.

10. Long Island Lighting Company is taking steps to consummate the plan and to put it into effect.

11. In the event the above-described proceedings pursuant to Sections 3 (a) or 2 (a) (7) (B) of the Act were to result in subjecting Long Island Lighting Company to the provisions of
7 Section 11 of the Act, it is probable that a reorganization of the company on a fair and equitable basis, substantially

at variance with the terms and conditions of the present plan, and with due regard to the public interest and the interests of investors and consumers, would be ordered by the Commission pursuant to Section 11 (b) (2) of the Act.

12. The outstanding capital stocks of Long Island Lighting Company are widely distributed among more than 10,000 public investors in many states, and such stocks are traded on a national securities exchange and otherwise. The steps involved in the consummation of the plan of Long Island Lighting Company include the surrender to the company or its transfer agent of certificates representing such shares of stock for overprinting with a legend and for new certificates representing the rights to be accorded the holders thereof under said plan.

13. The taking of the further steps to consummate the plan as described in the preceding paragraph will tend to induce trading in securities on the basis of said plan being an accomplished fact without disclosure of the fact that proceedings under the Act may require a radically different plan and may require determination of the fairness and equity of any new plan with reference to the relative rights of security holders as they existed prior to the consummation of the present plan. The result will be confusion to security holders as well as substantial difficulties in the discharge by the Commission and the federal courts of their duties with respect to the effectuation of fair and equitable plans of reorganization to comply with Section 11 (b) of the Act.

14. The consummation and effectuation of the plan, or of any steps yet to be taken in respect of the plan, would interfere with the carrying out by the Commission of its public duties
8 under the Act, would be detrimental to the public interest and the interest of investors, and would circumvent the jurisdiction of the Commission under the Act.

Wherefore the Commission respectfully prays:

1. That this Court enter a temporary restraining order and a preliminary and final injunction restraining and enjoining Long Island Lighting Company, its agents, servants, employees, attorneys, and assigns, including its transfer agents, and each of them, from directly or indirectly consummating or carrying out, or taking any action or steps to consummate or carry out or effectuate the said plan, including the making of any request for surrender of certificates representing outstanding shares of capital stock of Long Island Lighting Company, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, until determination of the above-described proceedings now pending before the Commission.

2. That this Court grant such other and further relief as it may deem appropriate in the premises.

DAVID K. KADANE,
Special Counsel,
Public Utilities Division,
HARRY G. SLATER,
SOLOMON FREEDMAN,
Attorneys,
Securities and Exchange Commission.
18th and Locust Streets, Philadelphia 3, Pennsylvania.

[*Duly sworn to by Harry G. Slater; jurat omitted in printing.*]

9 In United States District Court

Order to show cause and temporary restraining order

It appearing to the satisfaction of the Court on the verified Complaint that prima facie the plaintiff is entitled to an order restraining the defendant from taking the action hereinafter described in the restraining clause hereof; and

It further appearing that unless a temporary restraining order is issued forthwith the defendant will do and cause to be done the acts hereinafter described in the restraining clause hereof;

It is ordered that cause shall be shown on December 20th, 1944, at 10:30 a. m., E.W.T., why this Court should not enter a preliminary injunction restraining and enjoining Long Island Lighting Company, its agents, servants, attorneys, and assigns, including its transfer agents, and each of them, from
10 directly or indirectly consummating or carrying out, or taking any steps to consummate or carry out or effectuate its plan of recapitalization, including the making of any request for surrender of certificates representing outstanding shares of capital stock of Long Island Lighting Company, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, until determination of certain proceedings now pending before the Securities and Exchange Commission in respect of Long Island Lighting Company under Section 3 of the Public Utility Holding Company Act of 1935, and in respect of Ellis L. Phillips, Empire Power Corporation, Eastern Seaboard Securities Corporation, Lauridel Corporation, and Delaware Olmsted Company under Section 2 (a) (7) of said Act; and

It is further ordered that pending the hearing and determination of said Complaint for a preliminary injunction, said Long Island Lighting Company, its agents, servants, attorneys, and assigns, including its transfer agents, and each of them, be and

hereby are restrained from taking any of the action described in the preceding paragraph hereof; and

It is further ordered that notice of this Order to Show Cause shall be sufficient if given on or before the 19th day of December, 1944; that a copy of this order together with a copy of the Complaint filed herein, be served on the defendant forthwith, and that this order shall remain in effect until argument on said Order to Show Cause and thence until the further order of this Court.

HAROLD M. KENNEDY,
United States District Judge.

Dated December 19, 1944.

11 In United States District Court

Order

December 21, 1944

Plaintiff having moved herein by order to show cause dated December 19th, 1944 for an order restraining the defendant, its agents, servants, attorneys and assigns, including its transfer agents, and each of them from taking any action to effectuate a certain plan of recapitalization, more fully mentioned and described in the complaint herein, and the court having ordered that during the pendency of the motion and until the determination thereof and the entry of an order thereon the defendant be restrained from effectuating the said plan in the manner described in the complaint, and the motion having duly come on to be heard, and having been argued for the plaintiff by Messrs. Kadane, Slater & Freedman, attorneys for plaintiff, Harry G. Slater, Esq. and Morton E. Yohalem, Esq. of counsel, and by Messrs. Unger and Pollock, attorneys for preferred stockholders, Mr. Pollock of counsel for the plaintiff, in support of the motion, and the
12 court having heard Mr. Harold R. Medina, attorney for the defendant, in opposition thereto, and Mr. William G. Lockwood, attorney for the New York Curb Exchange, having appeared specially on the said motion.

Now on reading and filing the complaint herein, verified December 19th, 1944, in support of the motion, and due deliberation having been had, and the court having under date of December 21st, 1944 rendered its opinion in writing, it is, on motion of Charles G. Blakeslee, Esq., attorney for defendant,

Ordered that the said motion be, and the same hereby is, in all respects denied, and it is

Further ordered that the temporary restraining clause contained in the order to show cause herein, bearing date December 19th, 1944, be, and the same hereby is, vacated, set aside and annulled.

HAROLD M. KENNEDY,
United States District Judge.

13 In the District Court of the United States for the Eastern District of New York

Civil Action, Index No. 4606

[Same title.]

Brooklyn, New York, December 21st, 1944.

Appearances: Kadane, Slater & Freedman, Esqs., Attorneys for Plaintiff; Messrs. Slater and Yohalem, of Counsel, for the Motion. Unger & Pollock, Esqs., Attorneys for Preferred Stockholders; Mr. Pollock, of Counsel, for the Motion. Charles G. Blakeslee, Esq., Harold R. Medina, Esq., Attorneys for Defendant, Opposed. William G. Lockwood, Esq., Attorney for New York Curb Exchange, appearing specially.

Opinion

KENNEDY, D. J.

The plaintiff, Securities and Exchange Commission, applies for a temporary injunction restraining the defendant, its agents, servants and employees from "directly or indirectly consummating or carrying out, or taking any action or steps to consummate
14 or carry out or effectuate" a certain plan of reorganization readjusting the rights of its preferred and common stockholders.

The prayer for relief plainly states that the temporary injunction sought here and the final injunction sought in the action are identical.

The plaintiff, which was created by Section 4 of the Securities and Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15, U. S. C., Section 78, et seq.) is charged with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, et seq.).

On November 7, 1935, the Long Island Lighting Company, the defendant here, applied to the plaintiff under Section 3 (a) (1) for exemption from the act. On March 27, 1936, the Commission granted such exemption, reserving, however, in its findings and opinion the right to amend its order if it should find that the ex-

emption is detrimental to the public interest because of the defendant's activity, or that of any subsidiary company, or because a burden was placed upon interstate commerce.

The motion is based upon the complaint, and the complaint alone, and although the defendant appeared by attorney, it submitted no papers in opposition.

However, extended argument was had, and counsel supplied me with a number of facts not in dispute which underlie the application.

The preferred stock of the company has never had voting rights. Arrears have been piling up on this preferred stock, and since March 27, 1936, the date when the defendant was exempted from the provisions of the Public Utility Holding Company Act these arrears aggregate more than ten million dollars (Complaint, p. 4).

Evidently there has been desire on the part of everybody to make some adjustment in the corporate structure.

On February 29, 1944, the defendant submitted to the Public Service Commission of the State of New York a plan of readjustment, which, on April 25, 1944, its stockholders approved. This plan apparently was never acceptable to some of the preferred stockholders, who undoubtedly, in view of the increasing arrears, desired much greater control than the common stockholders were willing to give them. On July 27, 1944, the Public Service Commission of the State of New York acknowledged that it was helpless to compel the company to readjust its voting rights in accord with what could be considered "sound finance and equitable considerations" (Complaint, p. 7).

Nevertheless the defendant continued its effort to secure approval of this plan from the Public Service Commission. Thereupon, and on November 4, 1944, a protective committee of preferred stockholders applied to the plaintiff. This committee asked that proceedings under Section 3 (a) of the Act be reopened, and on November 10, 1944, the Commission directed that a hearing be held to determine whether the exemption of the defendant was detrimental to the public interest and whether its order of March 27, 1936 should be revoked or amended (Complaint p. 4). Still later, and on November 21, 1944, the plaintiff on its own motion instituted a proceeding under Section 2 (a) (VII) (B) of the Act to determine whether certain persons and corporations exert a controlling influence on the policy of the defendant, and whether they should not be subject to the obligations of the statute. On November 22, 1944, the two proceedings then pending were consolidated and a hearing ordered on November 27, 1944. This hearing was adjourned (not on the application of the defendant) to December 19, 1944.

In the meantime, and on December 14, 1944, the Public Service Commission of the State of New York approved the plan of reorganization, and an order effectuating the plan was filed on December 16, 1944. It was conceded on the argument by the plaintiff's attorneys that on the date last mentioned the
16 rights of the stockholders under the corporate structure theretofore existing came to an end under New York State law. The attorney for the New York Curb Exchange, appearing specially at the argument, stated to the court that trading in the old securities ceased on December 16, 1944 and transactions in the company's stock as modified by the reorganization commenced on December 18, 1944. In the early afternoon of December 19, 1944 there was submitted to me for signature an order to show cause containing an ex parte restraining clause as broad as the prayer for relief in the complaint itself. The motion was returnable on December 20, 1944. As will more fully appear later I had doubts about my power to grant even a temporary restraining order to the plaintiff. Nevertheless I did so.

From the argument of counsel for the plaintiff I conclude that specific jurisdiction to grant the injunction sought by the motion is not to be found in the act itself. Certainly the defendant had violated no order, rule or regulation of the plaintiff; during all of the times mentioned it was specifically exempt from the jurisdiction of the Commission. Defendant's proceedings in the Public Service Commission were taken openly, and apparently in full compliance with the law of the State of New York and of the administrative body to whose jurisdiction it was subject, namely the Public Service Commission. These proceedings, as indicated, stretched over the period between February 29, 1944 and terminated on December 16, 1944. Nor did the defendant, so far as either the complaint or the argument discloses, flout or ignore any order of the plaintiff with respect to the hearing ordered under Section 3 (a), or 2 (a) (VII) (B) of the act. No such claim was made. The plaintiff urges, however, that during the period between the final hearings in the Public Service Commission (September 27, 1944) and the final approval of the plan (December 14, 1944) the defendant was on notice that proceedings to revoke its exemption had been set in motion.
17 Plaintiff says that these proceedings might result ultimately in bringing the defendant within the jurisdiction of the Commission, and that if this happened the Commission might not approve the reorganization plan. Meanwhile, says the plaintiff, security holders will proceed with exchanges under the reorganization plan "without disclosure of the fact that proceedings under the Act may require a radically different plan" (Complaint p. 13). This in turn may result in confusion to security holders as

well as substantial difficulties to the Commission in the discharge of its duties.

The defendant, among other contentions, urges that to grant even a temporary restraining order here would be to subject the defendant to intolerable difficulty. It has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote.

If, as I have indicated, there is no specific statutory authority for the kind of order which the plaintiff seeks (and perhaps even if there were) it would be incumbent upon the plaintiff under general principles of equity to show that irreparable harm would result from the denial of the temporary injunction, and I use "would" in the sense that more than a bare possibility exists. I cannot say that such a showing has been made. Moreover the plaintiff, without specific statutory authority, is asking that on the bare complaint itself I should determine that it is entitled to all of the final relief which it seeks. Plaintiff's counsel admitted on the argument that in the case at bar there was no distinction between a temporary injunction and a permanent injunction, and I agree that this is so.

Leaving all other considerations out of the matter I doubt seriously that I have any such power as that which the plaintiff invokes.

18 I think plaintiff is really seeking a decision that the courts may, in aid of the statute (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79a, et seq.) restrain corporations not within plaintiff's jurisdiction against the commission of acts that plaintiff could deal with itself, were it later to acquire jurisdiction. Concededly this power has not been conferred upon the courts in terms by the Congress where it would most naturally be looked for; namely, in the statute itself. On the argument plaintiff's counsel seemed to urge that their cause was justiciable, and the relief sought should be granted under general principles of fair dealing—of equity. It is true that federal courts have general equity powers, but only when sitting in cases otherwise within their jurisdiction as defined by Congress (Briggs v. United Shoe Machinery Co., 1915, 239 U. S. 48, 36 S. Ct. 6, 60 L. ed. 138). And so if plaintiff would set the court in motion on principles of equity it must first bring the cause within some of the familiar fields of jurisdiction granted to the courts by the Congress, such as diversity or the existence of a federal question.

I doubt that there could be any diversity here, and certainly it is not plainly set forth in the bill of complaint. Is there a federal question? If so it must lie in the suggestion that plaintiff, a federal agency, seeks to protect itself against acts which might hamper it in the execution of its duty to enforce the statute (Complaint, p. 13). But I believe no federal question arises unless plaintiff's right of action may be said really and substantially to involve a controversy respecting the validity or construction of an act of Congress (Shulthis v. McDougall, 1912, 225 U. S. 561, 569; 32 S. Ct. 704, 706, 56 L. ed. 1205). The bill of complaint here does not disclose that any such controversy exists. Nor was it suggested in the argument that such a controversy exists, and that the granting or withholding of an injunction, either temporary or permanent, would really turn upon the construc-
19 tion or validity of the statute from which plaintiff derives its powers, or for that matter of any other federal enactment.

This reduces the issue to one that is comparatively narrow: under the guise of construing the statute to determine whether the power invoked by the plaintiff may be implied may I take jurisdiction, and then either exercise that power or not, depending upon which way the appeal to discretion lies? It seems to me that if I answer this question in the affirmative, and that if the courts under the guise of construing a statute can give themselves such sweeping power, then they and not Congress are defining jurisdiction. I cannot believe that this sort of "construction" (no matter how salutary the statute, or for that matter how great the specific benefit achieved by a decision in favor of the existence of such power) can take the place of a real controversy over what Congress meant by the words it employed in the statute. This is more like deciding what Congress meant by silence. When appeal is made to general principles of fair dealing and of equity it is understandable that federal courts have at times been unwilling to renounce jurisdiction, and may have done so reluctantly; but as I understand the matter they must. And I do so, without touching questions like the wisdom or fairness of the plan of reorganization here assailed.

Nor do I consider the other questions that it would be necessary to decide in plaintiff's favor in order that the relief it asks might be granted. It was strongly urged that there is no clear showing of irreparable harm here if injunction be withheld; that the plan, having been consummated, cannot be undone, nor its execution halted without creating a chaotic condition in defendant's corporate structure; that the plan was sub judice in the administrative authority of the state for eight months before the preferred stockholders invoked plaintiff's protection, and almost four

months after the Public Service Commission had in terms
20 suggested this course to them (Complaint p. 7). Moreover it does not clearly appear whether these preferred stockholders have a remedy in the state courts to review the action of the Public Service Commission—a remedy that they failed to invoke. I acknowledge that this last consideration, the effect of failure to exhaust a possible remedy in tribunals of the state, is not to be charged to plaintiff. But the preferred stockholders appeared on this motion before me and were heard. It was they who set in motion at least a portion of the consolidated proceedings looking to the recapture of jurisdiction by the plaintiff. And were the merits before me I would think it proper to consider whether a temporary injunction here might do violence not only to principles of equity, but to principles of comity also.

It is the power to speak on these matters that I renounce. One consideration remains. I intimated to counsel at the argument that I inclined to hold the views which I here express on the question of power. Indeed I adjourned the argument for several hours after indicating this, in the hope that counsels' research or mine would bring to light some controlling authority on the jurisdictional point. None was found. Counsel for plaintiff, in line with their duty, and no doubt appreciating that the want of a clear precedent injured their own cause, requested that I continue in force the broad ex parte restraining order, while review of any adverse ruling was secured. Since I have reached the conclusion that I am without power to grant the relief which plaintiff asks, and therefore should not have restrained defendant at all, I feel that this course would not be proper even though precedent seems to indicate that I might be justified in following it (Merrimac River Savings Bank against Clay Center, 219 U. S., 527, 55 L. ed. 320; Moscowitz, D. J., in Matter of Realty Associates Securities Corporation, Debtor, No. 45,024, E. D. N. Y., December 1, 1944). I suggested instead to counsel that the length and
21 character of any temporary ex parte restraint could with greater propriety be determined by the reviewing Court.

Motion denied, temporary stay vacated, submit order.

HAROLD M. KENNEDY,
United States District Judge,
Eastern District of New York.

22 In United States District Court

Notice of appeal

SIRS: Notice is hereby given that the Securities and Exchange Commission hereby appeals to the Circuit Court of Appeals for

the Second Circuit from the Order of the United States District Court for the Eastern District of New York, dated December 21, 1944, denying the application of the Securities and Exchange Commission for a temporary injunction, and dissolving a preliminary restraining order of said Court dated December 19, 1944.

Yours, etc.,

ROGER S. FOSTER,
Solicitor,
MORTON E. YOHALEM,
Counsel,
Public Utilities Division,
HARRY G. SLATER,
SOLOMON FREEDMAN,
Attorneys for the Securities and Exchange Commission,
18th and Locust Streets, Philadelphia 3, Pa.

Dated at New York, December 21, 1944.

To the Clerk of this Court.

CHARLES G. BLAKESLEE,
Attorney for Respondent,
225 Broadway, New York, N. Y.

23 In United States District Court

[Title omitted.]

Designation of record

Attorneys for plaintiff hereby designate the following portions of the record and proceedings in the instant case to be the record on appeal:

(1) Complaint for injunction filed December 19, 1944.

(2) Temporary restraining order and order to show cause returnable December 20, 1944, issued December 19, 1944.

(3) Order denying preliminary injunction and dissolving temporary restraining order after hearing, issued December 21, 1944.

(4) Opinion of District Court on order denying preliminary injunction and dissolving temporary restraining order dated December 21, 1944.

24 (5) Notice of appeal by Plaintiff herein filed December 21, 1944.

(6) Designation of record as set forth herein.

DAVID K. KADANE,
HARRY G. SLATER,
Attorneys for Plaintiff.

DECEMBER 27, 1944.

Service of a copy of the foregoing Designation of Record accepted this 27th day, December 1944.

CHARLES G. BLAKESLEE,
Attorney for Defendant.

In United States District Court

Clerk's certificate

I, Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct copy of the papers represented therein and constitutes the record of the said District Court in the above-entitled matter and that the last day to file said record is January 30, 1945.

In testimony whereof, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Eastern District of New York, this 29th day of December 1944, in the year of our Lord, one thousand nine hundred and forty-four, and of the Independence of the said United States, the one hundred and sixty-ninth.

[SEAL]

PERCY G. B. GILKES,
Clerk.

By SIDNEY R. FEUER,
Deputy Clerk.

25 In United States Circuit Court of Appeals for the Second Circuit

No. 233—October Term, 1944

(Argued January 15, 1945—Decided February 23, 1945)

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, APPELLEE

Before HUTCHESON, SIMONS, and CLARK, Circuit Judges

Appeal by the Securities and Exchange Commission from an order of the District Court for the Eastern District of New York denying appellant's motion for an injunction enjoining appellee from carrying out a plan of recapitalization approved by the Public Service Commission of New York. Order Affirmed.

26 Harold R. Medina, Charles G. Blakeslee, Charles E.

Elbert, John J. Donohue, Richard T. Davis, of counsel for appellee.

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On brief as Amici Curiae: Milton Pollack for preferred stockholders. William A. Lockwood for New York Curb Exchange.

Opinion

SIMONS, Circuit Judge:

The appellant sought temporary and permanent injunctions restraining the appellee from consummating a plan for its recapitalization until determination of proceedings pending before the Commission, involving the status of the appellee under the Public Utility Holding Act of 1935, 49 Stat. 803, 15 U. S. C. A. § 79 (a) et seq. The District Court denied the preliminary injunction on the ground that it lacked power to grant the relief sought. A temporary restraining order pending hearing, having been dissolved, a judge of this court granted a temporary restraining order pending hearing on the appeal.

The Commission sought protection by the District Court in the carrying out of duties asserted to devolve upon it under the Public Utility Holding Act, by enjoining the appellee from taking further steps to effectuate a plan of recapitalization, until in an
27 administrative proceeding before it, it was determined whether rights sought to be affected by the plan should be subjected to the reorganization standards of § 11 of the Act. The specific action sought to be enjoined is the overprinting of existing certificates for preferred stock and the issuance of new common stock, and the nature of the relief sought is the preservation of the status quo.

The appellee is a holding company as defined in § 2 (a) (7) of the Act, but exempt from the registration and regulatory provisions of the Act by an order of the Commission dated March 27, 1936. That order is, by its express terms, subject to revocation after hearing and a finding by the Commission that the circumstances which gave rise to its issuance no longer exists. The exemption is authorized by § 3 (a) of the Act and may be revoked in pursuance of § 3 (c).

On November 4, 1944, a petition was filed with the Commission by the preferred stockholders of the appellee, which led to the institution of proceedings by the Commission on November 10, to determine whether the exemption should be in whole or in part

revoked. The stockholders represented that the appellee was endeavoring to effectuate a recapitalization plan unfair to them and had engaged in activities which burdened interstate commerce and the means and instrumentalities of interstate commerce. On November 21, 1944, the Commission instituted a separate proceeding under § 2 (a) (7) (B) of the Act, for the purpose of determining whether certain persons or corporations owning or controlling substantial amounts of outstanding common stock of the appellee, exercised such a controlling influence over its management or policies as to make it necessary, in the public interest and for the protection of investors or consumers, that the appellee be subjected to the obligations, duties, and liabilities imposed by the Act. On November 22 the two proceedings were consolidated and a hearing ordered for December 19, which, for reasons presently appearing, was not held. It is asserted that if it should be
28 determined that the exemption granted to the appellee be revoked or modified, the consequence would be that the promulgation and consummation of the plan of recapitalization would then be subject to the jurisdiction, scrutiny, and approval of the Commission under the applicable standards of the Act.

On December 18, prior to the date set for hearing, it came to the Commission's attention, through the press, that the appellee was undertaking to consummate a plan under New York law without awaiting a determination whether it would be permitted to continue to enjoy its exemption, or whether it would be required to register as a holding company, or be subjected to the supervision of the Commission, and the present proceeding was at once begun to restrain such consummation.

Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to requirements of the Stock Corporation Law and the Public Service Law of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors. Rochester Gas & Electric Corp. *v.* Maltbie, 284 N. Y. 626. The appellee promptly filed its certificate of recapitalization together with the order of approval, in the office of the Secretary of the State of New York, in pursuance of the Stock Corporation Law. The plan became effective upon such filing (General Corporation Law, § 8), the rights of the stockholders under the corporate structure thereupon came to an end, trading in the old stock ceased on the New York Curb Ex-

change on December 16, and trading in the new stock com-
29 menced on December 18. On December 19 the appellee was ordered to show cause why a preliminary and permanent injunction should not be entered restraining it from carrying out the recapitalization plan, and concurrently the temporary restraining order issued. Because of it and the order out of this court compelling further restraint pending hearings on appeal, the appellee says it is now a corporation without stockholders and unable to do any of the things which, by state law, require the approval of stockholders.

The court, without determining whether a case had been made out for equitable relief by a showing of irreparable harm if the injunction should be withheld, and without considering whether state law provided a remedy to the preferred stockholders which they failed to invoke, denied the relief sought solely upon the ground that the Commission was without power, conferred upon it by the Act, to seek, and the court without power, because of limitations upon its jurisdiction, to grant it.

The Commission bases its appeal mainly, if not solely, upon the asserted legal principle that a federal court has power, upon the application of an administrative agency before which an administrative proceeding is pending, to preserve the status quo until such proceeding is concluded. The necessity for the preservation of such status is sought to be demonstrated by argument that if further steps are taken by the appellee to consummate its recapitalization plan, the rights of preferred stockholders will be broken up into new preferred and common shares in distributable form, and it might become impossible to adjust their rights on a basis which would adequately reflect existing equities. Trading in the new common stock would cause intervening equities in the purchasers to arise, and there would be serious doubt that the new stock could once more be separated so as to permit fair treatment to all security holders. In any event, trading in Long Island securities would be upon a misleading basis and there would be substantial diffi-
30 culties in achieving the fair and equitable result contemplated by the Act.

The Commission asserts, however, that it does not rely for its authority to seek relief, upon any specific grant of the statute. It disclaims reliance upon § 18 (*f*) as a basis for the jurisdiction of the court, for that section grants it authority to bring an action in a proper district court of the United States only for acts or practices which constitute or will constitute a violation of the provisions of the Act, or of any rule, regulation, or order thereunder, and it concedes there have been no such violations. It plants itself squarely upon the general equity powers of District Court under § 24 of the Judicial Code which extend, inter alia, to all suits of a

civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to suit. In support of its position it argues that the various branches of the federal government have certain implied and inherent powers which will be exercised, where appropriate, to protect the proper functioning of another branch of the government, that preservation of the status quo pending determination, is a traditional aspect of equity jurisdiction, and that the circumstances of the present case amply warrant its exercise to prevent circumvention of the Commission's jurisdiction under the Holding Company Act. It deems it an unnecessary refinement to determine whether particular cases relied on rest upon the fact that the action is brought by the United States or by an officer thereof authorized to sue, or upon the existence of a federal question, or upon the ground that the case falls within § 24 (8) of the Judicial Code applicable to "all suits and proceeding arising under any law regulating commerce". In seeking injunctive relief the Commission asserts it is asking the court to exercise the same kind of jurisdiction which a federal court would employ to protect its own jurisdiction, and to preserve a status quo pending proceedings before another tribunal.

31 The cases relied upon, however, which sustain the right of a federal equity court to preserve a status quo pending proceedings before it or another tribunal, are mainly those in which restraint is sought to protect a jurisdiction otherwise acquired. Such are the bankruptcy cases, typified by Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., 294 U. S. 648, and equity receivership cases, such as Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. (2) 456 (C. C. A. 2). No case has been cited to us, and none has been found, where a federal court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise.

The Commission leans heavily upon Securities & Exchange Commission v. U. S. Realty and Improvement Co., 310 U. S. 434, as a compelling precedent. There the respondent brought reorganization proceedings under Chapter XI of the Bankruptcy Act. Chapter X also provides for reorganization, but permits participation by the Securities & Exchange Commission in proceedings in the District Court. The Commission was allowed to intervene in the Chapter XI proceeding on the ground that it is charged with the performance of important public duties under Chapter X, which will be thwarted if a debtor may secure adjustment of his debts under Chapter XI. The Court found that the Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X,

but to the prevention, so far as the rules of procedure permit, of interference with their performance through improper resort to Chapter XI proceedings in violation of the public policy of the Act which it is the duty of the court to safeguard. Such permissive rule of procedure was found to be Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by para. 37 of the General Orders in Bankruptcy. By it a party may be permitted to intervene in an action when its claim or
32 defense and the main action have a question of law or fact in common. This provision dispenses with any requirement that the intervenor shall have a direct, personal, or pecuniary interest in the subject of the litigation.

The right to intervene, however, does not imply a right to bring an original suit, Sprunt & Sons v. U. S., 281 U. S. 249, 255; P. & W. Va. Ry. Co. v. U. S., 281 U. S. 479. In the U. S. Realty Company case jurisdiction of the court was originally invoked in the exercise by it of the bankruptcy power conferred upon a court of bankruptcy by §§ 74, 75, and 77 of the Act of March 3, 1933, to which Chapters X and XI have succeeded. Under those sections, if the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located, and it is not necessary to its validity that the proceedings should result in an adjudication of bankruptcy. Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., supra. It is, of course, established doctrine that a federal court, having first acquired jurisdiction of the subject matter, may enjoin parties from proceeding in other courts where the effect of the action would be to defeat or impair the jurisdiction of the federal court, Kline v. Burke Constr. Co., 260 U. S. 226, 229, but we fail to perceive its aid to the Commission, even though it extends to the protection of proceedings before an administrative tribunal.

The subject matter involved in the Commission's proceeding, was a determination whether to take jurisdiction over Long Island. It had previously exempted it. To say that it was seeking to protect a jurisdiction, which once it had renounced and was now undertaking to regain, is a contradiction in terms. The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge. It has no
33 jurisdiction over Long Island to be protected, and may draw such jurisdiction to itself only by a finding, after hearing, that circumstances which gave rise to the exemption, no longer exist, and by the promulgation of an order or revocation. This it has not done, and may never do.

Pennsylvania v. Williams, 294 U. S. 176, is urged upon us as authority for holding that a governmental agency may have judicial aid by a stay of judicial proceedings which would interfere with its administrative functions. There the state intervened in a receivership proceeding in a federal court, praying that federal receivers be required to surrender the assets of a corporation to a state agency for liquidation under state law. The court required the District Court to discharge its receivers and direct them to surrender the property to the state commission which had commenced proceedings for the winding up of the association, under state law. This is again an intervention ancillary to validly acquired jurisdiction over the property of the association. We do not perceive it to be authority for a holding that in this case the court should have interfered with the action of the New York Commission at a time when the appellant was without jurisdiction over Long Island. Moreover, the Williams case points out that it has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of state courts where its exercise would involve control of or interference with the internal affairs of a domestic corporation, and that there are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers, citing Matthews v. Rogers, 284 U. S. 521, 525. This is but another aspect of the doctrine that federal courts will carefully observe constitutional limitations upon their jurisdiction, and avoid unnecessary interference with state action. The principle is illuminated for present purposes by Board of Railroad Commrs. v. Great Northern Ry. Co., 281 U. S. 412, where
34 it was held that under the Interstate Commerce Commission Act the courts have no authority to prevent a carrier, by injunction, from putting into effect allegedly unfair intrastate rates until the Commission has a chance to determine their validity. "A judicial restraint of the enforcement of intrastate state rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created". It was also said that "the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission". It would seem, therefore, that the court in

the present case may not interfere with the domestic affairs of a state corporation seeking reorganization or recapitalization under state law, until by formal action of the Commission it was brought within the jurisdiction of the Act which alone created the Commission, and from which it alone derives authority.

While the Commission does not base its suit for relief upon any express authority conferred upon it by the Act, but rests its case upon the general equity powers of a federal court, it is not without importance that, by the terms of the Act which purport to provide for a comprehensive scheme for control of practices by public utility holding companies and affiliates affected with a national public interest, the Congress conferred upon the Commission in § 18 (a) and § 11 (d), the power to invoke the aid of the courts only to prevent evasions of the Act and non-compliance with the
35 orders of the Commission. There is concededly no power to restrain or discipline holding companies exempt from its provisions. It would seem, therefore, that the guide to statutory construction in the maxim expressio unius exclusio alterius, is applicable. Express powers are generally construed to be in negation of powers not expressly granted, and the application of the maxim here is not such an unwarranted use thereof as it was found to be in the Continental Ill. N. B. & T. Co. v. Chi. R. I. Co., supra, where it required other provisions of law to be ignored.

The appellee was exempted from the provisions of the Public Utility Holding Company Act; it has violated no law; it has disobeyed no order or regulation of the Commission. Finding itself in a critical situation in respect to the maturity of its securities, and in need of some change in its corporate structure, it applied for relief to the only agency authorized to grant it, namely, the Public Service Commission of the State of New York, with the sanction of its stockholders. There is no contention that it acted unlawfully; there is no requirement of law that obliged it to advise the appellant of the proceedings before the New York Commission, or of that body's favorable action upon its application. That its endeavor was precipitous may or may not have been in pursuance of its need—of that we are not advised. The Commission says that it did not overlook the possibility of its issuing a summary order under the residual powers conferred upon it by § 20 (a) of the Act, giving it authority from time to time to issue; amend, and rescind its rules and regulations, but that it seemed to it more consonant with traditional doctrines to rely upon the courts rather than upon an administrative agency itself for interlocutory relief, and advises us again and again that it has been careful not to prejudge the merits of the plan. It asserts, nevertheless, that the basis for its application for equitable relief was the conviction that a very serious ques-

36 tion is presented as to whether the plan conforms to standards of the Act designed to protect the public interest, and alleges that there is serious doubt whether, if presented to the Commission, the plan would be found to meet the standards prescribed by Congress for the protection of the investors. But no question in the collective mind of the Commission can give rise to a justiceable controversy, nor may its pronouncements, policy, or program, save as they have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of others, for the judicial power does not extend to the determination of abstract questions. Ashwander v. Valley Authority, 297 U. S. 288, 324.

The Commission argues that because of the extraordinary complexity of the programs dealt with, and the fact that the holding company device has become so largely a mechanism for circumventing legal restraints, it is especially important that the Act be given a broad and flexible construction; that in view of the public purpose to be served, it would seriously impair or limit its accomplishment if the presently sought remedy were withheld, and that there must be an interplay of functions on the part of both agencies and courts, in preventing the Act from being circumvented or evaded by methods which could not be foreseen and specially provided for. Undoubtedly these broad aspects of the matter must weight heavily with courts of equity, but while courts have upon occasion bridged gaps in the law by construction when compelled by clearly expressed legislative purpose, yet "judicial law-making should always be cautiously employed and should be severely restricted in scope." New England Coal & Coke Co. v. Rutland R. Co., 143 Fed. (2d) 179, 189 (C. C. A. 2).

If it be said that a proceeding for reorganization or recapitalization under state law by an exempt corporation may, for
37 all practical purposes, nullify the power of the Commission to exercise its rights and fulfill its duty to revoke the exemption, it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform it capital structure. It may not submit its plan of reorganization to the Commission because it is not subject to the authority of the Commission, and its exemption may have value to it or to new investors which neither its directors nor stockholders may be willing to surrender. It may not, except at its peril, resort to the remedial provisions of state law, for if it does the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation

without regard to the exigency nor to the effort and expense that may have been expended in formulation. We cannot but conclude that the Congress, either deliberately or by indirection, left unoccupied an area of supervision and control by the Commission. It is neither a novel nor unexpected result. In the difficult task of framing legislation to reach newly sensed evils in a complicated social, economic, and financial organization, the finite intelligence of the Congress may not always foresee all of the situations that may arise which call for supervision and regulation. The classical illustration derives from our endless succession of tax laws, and the distinction which the courts have drawn between tax evasion and tax avoidance. For the former the law provides its own discipline—for the latter, resort must again be had to the Congress.

The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so requests such further stay as may be necessary in that connection. We consider the problem here resolved not free
38 from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in Virginia Ry. v. U. S, 272 U. S. 658, 672, et seq. The presently operative restraining order will be continued until mandate shall have issued.

The order below is affirmed.

Concurring opinion

HUTCHESON, Circuit Judge, Concurring Specially:

I concur in all that is said in Judge Simons' excellent opinion. I think, though, that the short and simple answer to appellant's claim of jurisdiction is to be found in the fact that Section 25 [1] of the Public Utility Holding Company Act, which defines the

[1] Section 25 provides:
"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a court of appeals for the District of Columbia,' approved February 9, 1893 (D. C. Code, Title 18, Sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

jurisdiction of the federal courts with respect to suits
39 brought by the commission does not grant jurisdiction of a suit of this kind. I write this brief concurrence to say so. I think it may not be doubted that this section and Sections 11 (d) (e) (f) and 18 (d) (f), which state the circumstances and the manner in which the commission can apply to the courts for relief, were intended to be, and are, as to jurisdiction, both inclusive and exclusive. A word by word examination of these sections makes it clear that nothing in them authorizes the suit here brought. Indeed, the commission in its brief disclaims them as the jurisdictional basis of the suit. In my view, this disclaimer, in the light of the settled rule of law that a statutory scheme intended to be all inclusive must be treated as exclusive also, settles the controversy against the commission. For it is of the essence of such a scheme that what is not included is excluded.[2] The commission, therefore, in asserting a roving commission to sue for, or as, the United States, In Re: Debs, 158 U. S. 564, finds itself confronted with the difficulty, inherent in efforts to induce a court of special jurisdiction to embark upon the exercise of jurisdiction, vague in its generality, and general in its vagueness. But this is not all. It finds itself confronted with the one of attempting to sue out of the character with which the law has invested it, of invoking a jurisdiction beyond that to which the statute, by especially defining, has limited it. It seems quite clear to me that unless we are now to abandon in favor of notions completely alien to our system of law, the settled doctrines of federal jurisdiction and of statutory construction prevailing here, we must say: that the commission is the creature of statute; that it lives and moves and has its being by statutory authority alone, and only within statutory confines; that the creature may not say to its creator, "Why hast thou created me thus?"; and that the commission may not, therefore, by any kind of mysterious
metempsychosis, become disembodied from, and disen-
40 thralled of, the statute which gives it life, to sue not as creature but as creator, in short, as the United States itself. Because then the statute of its creation does not grant, but in effect denies, the jurisdiction invoked, I am in no doubt that the district judge was right and that his judgment should be affirmed.

Dissenting opinion

CLARK, Circuit Judge (dissenting):

Public Utility Holding Company Act of 1935, § 3 (a), 15 U. S. C. A. § 79c (a), authorizes the Securities and Exchange

[2] Posey v. TVA, 93 F. (2) 726; TVA v. Kluzer, 142 F. (2) 833; Breeding v. TVA, 9 So. (2) 6.

Commission to exempt certain holding companies of a predominantly intrastate character from the provisions of the Act, "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers"; but under § 3 (c), it "shall" revoke the exemption whenever, on its own motion or upon application of a company involved, it "finds that the circumstances which gave rise to the issuance of such order no longer exist." This power and duty of revocation was stressed by the S. E. C. in granting exemption to this
41 defendant in 1936.[3] Just as the S. E. C. was about to proceed to a scheduled hearing of petitions for revocation of the exemption, defendant, assuming to proceed under authority of a hesitant decision of the State Public Service Commission, took precipitous action to put into effect a plan of recapitalization which would change the status of the preferred stockholders—the very matter at issue in the proceedings pending before the S. E. C. That this action, if not restrained, would indubitably scramble the interests of these stockholders, perhaps beyond recall, is obvious; that it is the duty of the S. E. C., upon a finding that the conditions rather strongly indicated prima facie do exist, to attempt to unscramble them notwithstanding any obstacles placed in its way seems equally obvious. This duty is certainly not made less insistent by the Supreme Court's solicitude for the observance of security priorities under this Act, shown once again in Otis & Co. v. S. E. C., S. Ct., Jan. 29, 1945. Nor, indeed is it lessened by the constitutional overtones apparent in that decision and already introduced into this case by the contention of the preferred stockholders before the State Commission, which that Commission did not attempt to resolve.

Hence the need of the preventive protection of equity is great; such scrambling and unscrambling of securities can do hardly any one any real good and may do innocent investors, lacking inside knowledge, quite grievous harm. In fact, the only ones who may gain from the company's actions, outside of those frankly speculating or betting on the outcome, are seemingly the management and the common stockholders, who alone can vote and for whom the management is acting. But these, too,

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[3] Thus, after citing the statutory provision, § 3 (c) supra, it appropriately said: "The provisions of Section 1 (c) and 3 (d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is deterimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing." 1 S. E. C. 346, 346, 1936. Inequitable distribution of voting power was held by the Commission to be a ground for refusing exemption under this section in In re Niagara Hudson Power Corporation, Holding Co. Act of 1935, Release No. 5115, June 20, 1944; cf. Ecker v. Western Pac. R. R. Corp., 318 U. S. 448, 474; Okin v. S. E. C., 2 Cir., 145 F. 2d 913. In the present case the Commission was also acting under § 2 (a) (7) (B), petitions under the two sections being consolidated for a single hearing.

can profit only to the extent that presenting a fait accompli to the S. E. C. may discourage that body from further activity. Its past record of assiduity in protecting the public interest suggests that even the hope of such a consequence may be in vain.

My brothers' opinion tends to give the picture of an
42 orderly proceeding under state supervision rudely interrupted by the attempted interference of a federal agency to vindicate in an academic way a power which it has not invoked and may never wish to utilize. Since the issue below was strictly limited to one of power and jurisdiction alone and the S. E. C. with great circumspection has attempted to avoid prejudging the issues which may later come before it, the weight of the case against the defendant is perhaps unimportant at this stage of the proceedings. But denial of relief has been rested to a considerable extent upon what is concluded to be the vagrant nature of the federal interest herein. Hence I deem it necessary to emphasize how differently this matter appeared to the State Commission itself than as here stated. That Commission's criticism of the defendant for voting huge dividends to the common stockholders in the past and for denying representation to the preferred stockholders, notwithstanding that their dividends were greatly in arrears, its regret at its own lack of power to rectify the situation, and its final vote of only three in favor of what appears hardly more than a washing of its hands of the matter, over the protest of its able chairman and another commissioner deploring action while matters were "in a crucial stage before the Securities and Exchange Commission," amount to an excoriation of the officers and management which I should have thought they would have wished to show undeserved at the earliest opportunity possible. And certainly no better forum could have been offered them than that of the scheduled hearing before the S. E. C. The support which defendant appears to draw from the State Commission's action seems somewhat odd; for that action is almost a direct invitation or appeal to the S. E. C. to afford the relief of the State agency cannot.[4]

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[4] On July 27, 1944, the Commission through Chairman Maltbie rendered an opinion with these significant passages (quoted in the complaint herein):

"It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?

"The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944, for at least eleven sixteenths dollar per share and received $8.25 for 12 shares (brief, p. 11), whereas under the proposed plan each holder of 12 shares is to receive only

43 Again the opinion stresses the difficulty under which an exempted company must operate if it must fear the renewed control of the S. E. C. at any time. I cannot avoid the feeling that practically this is an exaggeration of conditions; in daily life milk producers still seem to operate, notwithstanding numerous city health requirements, we all survive various traffic, police, and other regulations, and light and power companies and their holding parents and grandparents are yet operating, in spite of the ministrations of the S. E. C. But the point is that these provisions are announced by the Congress as a part of a general plan of what it considers wise public policy; and we cannot eliminate them, even if we would like to do so. Whatever this court does, indeed
44 whatever may be the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide—if necessary, in a new proceeding and under another section of the statute—will still exist. There are questions here involved too important not to survive a mere ruling of the court's lack of jurisdiction to interfere at a primary stage of the dispute. In fact, one wonders whether defendant is well advised in seeking to shut off an early adjudication of these important issues, in view of what would seem the well-nigh inevitable consequence of rendering its new securities largely unmarketable during the period of uncertainty.[5]

45 In view, therefore, of the undoubted need of a remedy, I think we should direct our attention to possible ways and

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$5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and as a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration, for the preferred stockholders as they purport to have now, the company could have avoided the nonpayment of preferred dividends for six years."

Another opinion, dated October 17, 1944, and adopted December 14, 1944, with Chairman Maltbie and Commissioner Burritt not voting for the reasons stated in the text, went into the "Inadequate Participation by Preferred Stockholders," the limited steps taken to meet the problem, and the question raised whether it would be better to abandon the plan altogether or accept what was proposed. In deciding upon the latter it said that the proposed plan was a step in the right direction from the standpoint of the consumer and that it did place the company's financial structure upon a more stable basis. Continuing it said: "However, from the standpoint of preferred stockholders, the plan leaves much to be desired. But the Legislature has not given this Commission the power to formulate a new plan or to engraft changes upon the proposed plan and to compel the company to accept the changes. All that we are authorized to do is to approve or to reject the plan proposed by the company. The Legislature has provided a remedy for any stockholder who is dissatisfied with the plan. He may seek an appraisal of his stock and obtain the appraised value thereof upon compliance with the conditions specified in §§ 21 and 38 of the Stock Corporation Law." Obviously this latter remedy is not appropriate to restore or protect the value which the plan has already threatened to destroy.

[5] In the light of this situation, resulting from the provisions of the federal statute itself, the memorandum of the New York Curb Exchange as amicus curiae, suggesting, and apparently objecting, that "the stockholders are in effect frozen and this condition will continue so long as the injunction is in effect," seems surprising. The Exchange ought hardly to take sides in a dispute between classes of investors. But in any event, the Exchange would seem to have some obligation to warn traders of the defects attaching to the new stock even if and when it becomes unfrozen.

means to that end, rather than confine ourselves to discovering objections to the method which the S. E. C. has determined upon. After all, we are agreed upon the need of a temporary stay; the District Court is not very far distant from the offices of the S. E. C. in Philadelphia; and a group of preferred stockholders is already before us as amicus curiae and obviously ready for greater participation if justified in law. I do not think it would be difficult for my brothers—upon finding doubts I do not share as to the procedure actually followed—to find and state a procedure which will accomplish whatever is necessary. And I conceive it a court's duty to do so, particularly in view of the patent admonition of Congress to that effect, in the first section of the Act, where is set forth at length the evils which gave rise to this legislation [6] and the broad public policy intended to be subserved by it. The legislators wisely knew that they could not foresee all the holes which astute counsel might discover in legislation so far-reaching; and so with foresight they stated a broad policy to guide courts in their approach to statutory interpretation. Certainly they could hardly have foreseen a lacuna destructive of the very purposes of
46 specific sections of the Act and resting merely upon the celerity with which a company acts when faced with a call for a hearing before the S. E. C.[7]

Moreover, this very approach was followed in Securities and Exchange Commission v. U. S. Realty & Improvement Co., 310 U. S. 434, which reversed this court's conclusion, In re U. S. Realty & Improvement Co., 2 Cir., 108 F. 2d 794, that nothing could be done about a more serious gap in the Chandler Act dealing with corporate reorganizations. Now, after the event, we seem inclined to discover grounds showing that result predestined and easily distinguishable from our present case. Actually, however, the problem of interpretation there was initially much more difficult than the one here. For there, unlike our case, the fundamental jurisdiction of the S. E. C. to act at all was most doubtful, and there appeared to be also positive prohibitions against the S. E. C.'s right even to raise the question. The Chandler Act, in providing for

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[6] One of these was the squeezing out of preferred investors. See Sen. Rep. No. 621, 74th Cong., 1st Sess., 1935, 26, 58 H. R. Rep. No. 1318, 74th Cong., 1st Sess., 1935, 12; S. E. C. Report on Protective and Reorganization Committees, Part VII, 109–187; Dodd, The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act, 57 Harv. L. Rev. 295; Dodd, Fair and Equitable Recapitalizations, 55 Harv. L. Rev. 780, 796–806, 816; Latty, Fairness—The Focal Point in Preferred Stock Arrearage Elimination, 29 Va. L. Rev. 1, 27–39; Otis & Co. v. S. E. C., S. Ct., Jan. 29, 1945, supra.

[7] Defendant stresses the need of speedy action under the order of the State Commission and points to the provision in the order that it shall report its acceptance within 30 days after service of the order. But that certainly did not require action the next day and three days before the date of the S. E. C. hearing. Moreover, even if the acceptance required was other than formal, and called for immediate execution of the plan, the Commission, which had been delaying action to secure better results, would obviously have granted more time upon request for cause shown.

corporate reorganizations under Chapter X and for arrangements under Chapter XI, had set forth overlapping and in part conflicting provisions without any definite suggestion for their reconciliation. Accordingly the Realty Company sought the protection of Chapter XI (wherein the S. E. C. had no rights or duties of any kind), and nothing in express terms negatived its right so to proceed. This initial question of bankruptcy jurisdiction under the statute was the one which proved most difficult throughout the proceedings; out of a total of twelve judges who heard the case at different stages, six were of the view that the company's
47 right to petition only for an arrangement could not be denied. The eventual denial of that right had to rest, therefore, upon an interpretation of the purposes of the Chandler Act and an exposition of how these would be frustrated by the contrary holding. As to the S. E. C., its only standing, by the terms of the statute itself, was to report upon a plan in a Chapter X proceeding, under certain conditions and with a right of intervention in such a proceeding, but with an express prohibition against appeal, § 208, 11 U. S. C. A. § 608, which suggested a lack of status beyond the limited one expressed. The District Court, however, had allowed the S. E. C. to intervene to protect the public interest involved; and while this part of the court's judgment was reversed by this court, 108 F. 2d 794, 797–799, it was approved by the Supreme Court as a discretionary ruling under F. R. C. P. 24 (b), thus establishing the standing of the S. E. C. to litigate in support of its public responsibilities.[6]

48 In our present case the jurisdiction of the S. E. C. to act eventually on the issues presented to it for hearing is beyond dispute under the statute itself; and its duty to appear as a litigant to enforce its orders—eventually—is likewise clear under § 18 (f), and cf. §§ 11 (d) (f), 25. The real issue, as developed in

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[6] The opinion suggests that recognition of the S. E. C.'s right to intervene under F. R. C. P. 24 does not support its right to sue directly. It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486, as follows: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it.*" [Italics added.] So the reference in the U. S. Realty case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing Commonwealth of Pennsylvania v. Williams, 294 U. S. 176, 66 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See Commercial Cable Staffs' Ass'n v. Lehman, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, Nature of Permissive Intervention under Rule 24b, 3 Fed. Rules Serv. 704; Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 50 Yale L. J. 65.

the opinion herewith, is whether or not this action is premature. (Of course, as a practical matter, action must be taken now to be really effective.) This is demonstrated by the emphasis in the opinion upon an existing jurisdiction of the court as ground for distinguishing cases such as Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. R. Co., 294 U. S. 648, Commonwealth of Pennsylvania v. Williams, 294 U. S. 176, 96 A. L. R. 1166, and Graselli Chemical Co. v. Aetna Explosives Co., 2 Cir., 252 F. 456. But for my part these cases are authority for the S. E. C. here because its jurisdiction, given it by statute, is being exercised to the fullest extent that is presently appropriate. It has taken jurisdiction of the petitions and ordered a hearing with notice, just as it had committed itself to do on its original grant of exemption. And its jurisdiction, thus properly accepted, is now being flouted as directly as was federal power in the cited cases, or in S. E. C. v. U. S. Realty & Improvement Co., supra, where, as we have seen, jurisdiction for the S. E. C. was much more difficult to discover, or In re Debs, 158 U. S. 564, which was a still broader assertion of federal power and duty.[9] It seems to me that
49 this case is an appropriate vehicle for vindication of an important federal right, brought in the proper federal court within the express language of general federal jurisdiction, 28 U. S. C. A. § 41 (1).[10]

But there seems to be a thought that the S. E. C. should first have taken some affirmative action which it could then ask the court to enforce under § 18 (f) of the Act. The reasons why the S. E. C. did not itself pass an order of injunction and then ask its enforcement are, as it states, that it wished to proceed with due circumspection and without projudgment of the case. Further

[9] Board of Railroad Commissioners of North Dakota v. Great Northern Ry. Co., 281 U. S. 412, so far as it goes, is also a direct authority. There it was held that intrastate railroad rates established by a state commission would not be set aside because of the pendency of proceedings before the Interstate Commerce Commission *at the suit of the carriers*. The Court says significantly, 281 U. S. at page 430: "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

[10] As the S. E. C. urges, it seems an overrefinement, suggesting an unnecessary limitation upon the general broad power of federal courts to protect federal jurisdiction as established by Congress, to place jurisdiction here entirely upon the terms of a single specific statutory enactment and thus circumscribe it by what is there expressed. It seems to me that the S. E. C. should be held entitled to sue here as an officer of the United States enforcing a public right under the laws of the United States. But if it is necessary to look to new grants of power, I suggest that §§ 18 (f) and 25 of the Act do chart the course, and that it is not sufficient to say that they apply only after definite orders of the S. E. C. and for violations thereof. As developed later in the text, it would seem that what the S. E. C. did amounted in substance to a determination that temporary restraint was in order. And rights and duties under the Act were, therefore, definitely threatened, so as to make these statutes applicable if a limited source of jurisdiction is considered thus requisite. Moreover, if there is doubt whether or not the necessary formalities have been completed by the S. E. C., the case should be held, as stated below, until we are sure the have been completed.

analysis, I believe, will show that it has done all it should properly have done at this stage of the proceedings. It could hardly issue anything like a permanent injunction without due notice and a hearing; this, or its full equivalent, it was proceeding to consider at the appropriate time, and it should be protected against the prejudice to its proper adjudication of the issues which is offered by the hasty action of the respondent in those proceedings
50 before it. If, on the other hand, it should have issued some formal order of temporary restraint—without full hearing, for which time was lacking—mail service from Philadelphia is only overnight and such order can reach the District Court long before our mandate goes down. But in reality what will that add to the steps already taken by the Commission in first ordering a hearing and later in directing its General Solicitor to institute this action and press it for the safeguarding of the hearing as ordered? I assume we are not prepared to question the authorization of the Solicitor to act in the premises; if we are, the order of authorization will hardly be slow in arriving. All these seem to me only formalities, easily satisfied if not already completed, to justify the position of the S. E. C.; if it can come to the federal courts after a hearing on December 19 to protect its jurisdiction, it should be entitled to come to us before that date to protect a threat against the fairness of its hearing to determine the exercise of that jurisdiction, and the prejudice resulting from a coup d'etat by the corporation most involved.

Finally, if, notwithstanding these years of operation and the numerous court proceedings where it actually has been heard in protection of the public interest, the S. E. C. is found to have not only no duty, but no right, to act in the present situation, then it seems to me the preferred stockholders who are directly threatened with injury have a clear right to ask the court for relief. I should hold that they had such right under the implications of the Act itself, just as has been held with respect to other acts administered by the S. E. C., Baird v. Franklin, 2 Cir., 141 F. 2d 238, 244, 245, certiorari denied 65 S. Ct. 38; Charles Hughes & Co. v. S. E. C., 2 Cir., 139 F. 2d 434, 437, 438, certiorari denied 64 S. Ct. 781; Goldstein v. Groesbeck, 2 Cir., 142 F. 2d 422, 427, certiorari denied Groesbeck v. Goldstein, 65 S. Ct. 36; but even if they
51 must show diverse citizenship, as well as a federal right, there are undoubtedly persons who can fulfill all such requirements among the group appearing before us as Amicus curiae. At least the case should be held below to give them the opportunity to appear as plaintiffs. Cf. Hackner v. Guaranty Trust Co. of New York, 2 Cir., 117 F. 2d 95, 98, certiorari denied 313 U. S. 559.

52 In United States Circuit Court of Appeals
for the Second Circuit

No. 19660

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Notice of, and motion for, extension of presently operative restraining order

Filed March 7, 1945

To CHARLES G. BLAKESLEE, Esq.
225 Brodway, New York, N. Y.
HAROLD R. MEDINA, Esq.
165 Broadway, New York, N. Y.

Please take notice that, upon the annexed affidavit of Theodore L. Thau, verified March 7, 1945, the undersigned is this day filing with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, for presentation to Circuit Judges Hutcheson, Simons, and Clark, the motion set forth below.

Motion

Appellant, Securities and Exchange Commission, for the reasons set forth in the annexed affidavit, moves the Court, in the alternative, for an order either—

(a) Extending the presently operative restraining order
53 heretofore granted to and including final disposition of this case by the Supreme Court of the United States upon a petition for writ of certiorari proposed to be filed on behalf of the Commission, provided that the Commission shall file its said petition within fifteen days of the disposition of this motion by this Court; or

(b) Extending the presently operative restraining order heretofore granted by this Court to and including the date of a determination by the Supreme Court of the United States, or a Justice thereof, either granting or refusing to grant a temporary injunction during the pendency before the Supreme Court of said

petition for a writ of certiorari, upon condition that the Commission shall make application therefor to the Supreme Court, or a Justice thereof, upon notice to appellee, within five days of the disposition of this motion by this Court;

such extension, upon either alternative, not to delay the entry of such order of affirmance by this Court as may be necessary as a condition precedent to the filing of a petition for a writ of certiorari. Appellant further prays for such other and further relief as may be appropriate.

ROGER S. FOSTER,
Roger S. Foster, *Solicitor*,
Counsel for the Securities and Exchange Commission,
18th and Locust Streets, Philadelphia 3, Pa.

Dated: Philadelphia, Pa., March 7, 1945.

54 In United States Circuit Court of Appeals

[Title omitted.]

Affidavit of Theodore L. Thau

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Theodore L. Thau, being duly sworn, deposes and says:

1. He is an attorney for the Securities and Exchange Commission, plaintiff-appellant herein.

2. This is an appeal from a judgment of the United States District Court for the Eastern District of New York, entered December 21, 1944, by the United States District Court for the Eastern District of New York, which denied, for lack of jurisdiction, the Commission's motion for a preliminary injunction restraining the defendant-appellee, Long Island Lighting Company, from consummating its plan of recapitalization until the outcome of proceedings now pending before the Commission to determine whether Long Island Lighting Company and its said plan of recapitalization are subject to the jurisdiction of the Commission under the provisions of the Public Utility Holding Company Act of 1935.

55 3. On December 21, 1944, a temporary restraining order was issued by Judge Augustus N. Band, of the United States Circuit Court of Appeals for the Second Circuit, which provided that

"• • • pending the hearing of this appeal or the further order of this Court, the respondent and its attorneys, officers, employees

and agents, including its transfer agents, and each of them, be and they hereby are enjoined and restrained from directly or indirectly consummating or carrying out, or taking any steps to consummate or to carry out or effectuate its plan of recapitalization, including the making of any requests for surrender of certificates representing the outstanding shares of capital stock of Long Island Lighting Company, the over-printing of any legend on such certificates, or the issue or delivery of any certificates in exchange, and thence until the further order of this Court. * * *"

4. On February 23, 1945, the United States Circuit Court of Appeals for the Second Circuit handed down a decision, one judge dissenting, affirming the judgment of the District Court. The decision of this Court provided that "the presently operative restraining order will be continued until mandate shall have issued" for the following stated reasons:

"The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so request such further stay as may be necessary in that connection. We consider the problem here resolved not free from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in Virginia Ry. v. U. S., 272 U. S. 658, 672, et seq.

5. The Commission has determined to petition the Supreme Court of the United States for a writ of certiorari
56 from the decision and judgment of this Court, and is advised that the Solicitor General of the United States has determined to present said petition on behalf of the Commission. The Commission is now diligently preparing its petition for a writ of certiorari and proposes to file said petition with the Supreme Court as promptly as possible after the entry of this Court's order.

6. The extension of the temporary restraining order requested in the accompanying motion is requested for the following reasons:

(a) Unless said restraining order is continued in effect, the Company, which, we understand, opposes this motion, will proceed to consummate its proposed plan of recapitalization in the manner sought to be enjoined by the Commission's complaint.

(b) Should said plan be consummated by the Company all proceedings in the Supreme Court upon the proposed petition for a writ of certiorari may well be rendered moot.

(c) Should said proceedings in the Supreme Court be rendered moot by consummation of the Company's plan of recapitalization, the Commission will be deprived of its right to seek review by the Supreme Court of the decision by this Court of a question which

is of importance in the administration of the Public Utility Holding Company Act of 1935, and which the opinion of the majority of this Court characterized as a question "not free from doubt."

7. The reason for presenting this motion in the alternative is that in the event this Court should deny the further stay we desire to present an application for the same relief to the Supreme
57 Court or a Justice thereof. The Commission has heretofore refrained from so doing because it is advised that it is regarded as preferable practice to present such motions to the Circuit Court of Appeals in the first instance, and to make application to a Justice of the Supreme Court only if the Circuit Court of Appeals declines to grant a stay. Thus, even if this Court should determine not to extend the presently operative restraining order until the final outcome of proceedings in the Supreme Court, it is important, in order to prevent this case from becoming moot, that this Court grant a stay until the Supreme Court or a Justice thereof has had an opportunity to hear and determine a motion by the Commission for further stay pending proceedings before that Court. In this connection it is the Commission's understanding that it is usual for the Justice of the Supreme Court to whom such a motion is presented to submit the motion, where time permits, to the full Court at conference, and it would therefore be important that any further stay which this Court might grant should at least extend to and including a decision by the Supreme Court on the question of extending such stay throughout the proceedings before that Court upon the petition for a writ of certiorari.

8. While the Commission's counsel understand that Long Island will oppose this and any other motion which the Commission may make for an extension of the restraining order, we are not advised of the grounds of such opposition except as previously disclosed in briefs and argument before this Court. Apparently the grounds of opposition relate to the consideration of the merits of the Commission's prayer for injunction which the District Court declined to pass upon because of its belief that it lacked jurisdiction. In its brief and argument before this Court appellee conceded that these discretionary considerations were not in issue but referred to them only because of their alleged bearing upon the issue as to the jurisdiction of the District Court (appellee's brief, p. 23). Neverthe-
less, the Commission's answer to these arguments will be set
58 forth insofar as they can be anticipated. Such objections appear to be that extension of the temporary restraining order would (a) prevent Long Island from pursuing certain corporate functions, and (b) prevent Long Island's stockholders from dealing freely with their securities in the public markets.

9. The Commission's answers to the foregoing objections are as follows:

(a) With respect to the objection that an extension of the temporary restraining order would prevent Long Island from pursuing certain corporate functions, it is clear that the business of Long Island, i. e., the rendering of gas and electric service, is in no way impeded by the presently operative restraining order. As we understand this objection, therefore, it is that Long Island may be impeded in the election of directors and in certain extraordinary financial transactions. As to this, it should first be stated that the complaint filed by the Commission is directed to ensuring Long Island's preferred stockholders fair and equitable treatment in any proposed plan of recapitalization, and since the rights and assets of the corporation as such are not involved, Long Island is in essence occupying the position of a mere stake holder. Moreover, insofar as there is forthcoming an annual meeting for the election of directors, it is submitted that no detriment can result from postponing this election; Long Island has not contended that it would be detrimental to it if the existing management should hold over pending the outcome of this litigation.

59 Long Island has contended that a serious consequence of the lack of voting stockholders is its inability under New York law to mortgage its assets. With respect to this point it should be noted that the Company's first mortgage debt was refunded in 1942 and does not mature until 1972. That debt presently comprises (1) ($30,150,000 3¼% First Mortgage Bonds which are a lien not only upon the existing physical properties of the Company but also upon any after-acquired properties and upon the Company's holdings of common stocks of its direct public utility subsidiary companies; and (2) $8,178,000 principal amount of 3¾% Debentures which do not mature until May 1, 1956. Contrary to the statement in the opinion of the majority of this Court, the Company when it promulgated the plan was not in a "critical situation in respect to the maturity of its securities" since its securities do not mature for many years. Moreover, with respect to the further statement in the opinion of the majority of this Court that Long Island "was in need of some change in its corporate structure," it may be observed that the arrears on Long Island's preferred stocks had been accumulating since 1938 and the proposed plan was not submitted to the Public Service Commission of the State of New York until February 29, 1944. Finally, any proposed issues of additional mortgage bonds or any refunding of outstanding mortgage bonds would require the institution of appropriate proceedings of uncertain duration before the Public

Service Commission of the State of New York pursuant to Section 69 of the New York Public Service law before they could be authorized.

It is the Commission's position that the considerations of public interest involved in ensuring fair and equitable treatment of Long Island's public security holders far outweigh any conceivable detriment to the corporate functions of Long Island.

60 (b) In answer to the second objection, it is the Commission's position that security holders will not be seriously affected by a stay in dealing freely with their securities upon the public markets. The Commission is vitally concerned with this problem and, indeed, it was the desire to prevent trading on a basis which might prove misleading, in view of the potential impact of the Public Utility Holding Company Act upon Long Island's plan, that provided a major impetus for the Commission's complaint for equitable relief in this case.

While the New York Curb Exchange determined on its own initiative to suspend trading in the new preferred and common stocks of Long Island on a "when-issued" basis immediately upon advice that a temporary restraining order had been issued by the District Court, the Trading and Exchange Division of the Commission has advised the Curb Exchange and the National Association of Securities Dealers, Inc. (which is a national association of over-the-counter dealers), as well as a number of individual dealers who have made inquiry, that there is nothing to prevent trading in the old preferred or common certificates for whatever interests they now represent, provided adequate disclosure is made of all material facts including the pendency of administrative and judicial proceedings and the possible effect upon the ultimate rights of Long Island's security holders. The Commission is advised that such trading has been carried on in the over-the-counter market, that quotations have appeared in the National Daily Quotation sheets, and that in practice transactions are consummated by delivery of old certificates duly endorsed. The effect of such sales is to transfer whatever

61 changed rights have been vested in holders of the old certificates as a result of the filing of the charter amendment and these rights are transferred subject to the possibility of readjustment in the event that Section 11 of the Holding Company Act is applicable to the plan. It is by no means certain that similar trading cannot be resumed on the Curb while a temporary restraining order is in effect, subject, of course, to the disclosure requirements imposed by the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, which are equally applicable whether a security is traded

on an exchange or on the over-the-counter market. It would seem further that any mechanical obstacles presented by problems of quotations and delivery are not insuperable.

It is the Commission's position that the extension of the restraining order will not deprive Long Island's security holders of adequate recognition in maintaining a market for their shares. At the same time preservation of the restraining order will afford the Commission an opportunity to have determined by the Supreme Court the question whether it can protect the interests of such security holders against a plan challenged as unfair by a substantial group of preferred stockholders and to protect the public interest against any trading in such securities on a misleading basis.

10. The Commission has throughout this proceeding endeavored to act with the utmost dispatch. The record in this case discloses that the Commission first learned of the Company's proposed action to consummate the plan, through the public press, on December 18, 1944. The Commission's complaint was filed in the District Court on December 19. The application for temporary relief was heard by Judge Kennedy, who issued his decision on December 21. That same day the Commission filed its notice of appeal and applied to a single judge of this Court
62 for a temporary restraining order, pending decision by this Court. The Commission's brief was served on Long Island on December 29 and this Court heard oral argument on the first available date.

11. A petition for a writ of certiorari is now in preparation and it is the Commission's intention, in the event that a stay is granted, to comply with the suggested condition as to filing the petition within fifteen days of disposition of this motion, by filing the petition in typewritten form. While the company will be entitled to await service of a printed copy of the petition and also of the printed record as made up under the direction of the Clerk of the Supreme Court, the company will be free to file its answer without waiting for service of said printed copies. Inasmuch as the record in the Supreme Court will consist of the printed record in the court below, together with the opinion and order of this Court, there would be no practical difficulty in following this course. The Commission has available sufficient copies of the record below to meet the requirements of the Supreme Court Rules. Thus, there is no reason to anticipate more than a few weeks' further delay to permit the Supreme Court to determine whether or not it will grant a writ. In the event that the Supreme Court should determine that the case is one deserving review upon a writ of certiorari, there could hardly be a

serious question as to the appropriateness of the stay continuing until the Court has disposed of the matter on the merits and there is every prospect that the matter could be disposed of at the present term of court.

[SEAL] THEODORE L. THAU.
Theodore L. Thau.

Subscribed and sworn to before me this 7th day of March 1945.
AMANDA WELLS,
Notary Public.

63 In United States Circuit Court of Appeals

Decision

NEW YORK, 3/14/45.

I am directed by Judges Hutcheson and Simons to enter an order granting alternative (b) of this motion for a stay pending application to the Supreme Court for such relief. I concur in this as far as it goes, although in my judgment the public importance of the question, and the attendant circumstances made more desirable the grant of alternative (a) of the motion—or a stay pending application for, and disposition of, writ of certiorari.

CHARLES E. CLARK,
U. S. C. J.

[File endorsement omitted.]

64 In United States Circuit Court of Appeals

[Title omitted.]

Affidavit in opposition to motion for extension of temporary restraining order

Filed March 8, 1945

STATE OF NEW YORK,
County of New York, ss:

Charles G. Blakeslee, being duly sworn, deposes and says:

I am general counsel for Long Island Lighting Company and its attorney in this proceeding.

The Company opposed plaintiff's application to continue the stay contained in the order to show cause by which these proceedings were commenced on December 19th, 1944 in the United States District Court; it opposed plaintiff's application to one of the judges of this Court for a stay pending the determination

of the appeal herein; it now opposes the present application for a continuance of the existing restraining order pending application to the Supreme Court for certiorari.

This is an action in which the sole relief sought by plaintiff is in substance the relief which plaintiff obtained in the beginning, still enjoys by virtue of the order of one of the judges
65 of this Court and will continue to profit by should the present application be granted in any form, even though necessarily limited as appellant concedes upon condition that application be made within fifteen (15) days to the Supreme Court for certiorari or in the alternative within five (5) days to a justice of the Supreme Court pending the application for certiorari. This granting from the beginning of this suit of the full relief prayed for by way of final judgment exists at the present time and will, if presently extended, continue to exist not only despite the most diligent and consistent protests by appellee that the United States District Court was wholly without jurisdiction to grant any relief, but despite the decision of the United States District Court and of this Court that appellant was without power to seek and the United States District Court without power to grant any part of the relief which appellant has thus, by the expedient of a succession of temporary restraining orders, obtained.

It is traditional that the remedy of injunction is to be sparingly exercised and never in doubtful cases. Whatever superficial showing may have appeared at the outset in this case has been thoroughly dissipated by a full consideration of the simple questions of fundamental jurisdiction which are involved. When United States District Judge Harold M. Kennedy became convinced that the District Court was wholly without power to grant the relief requested, he vacated the stay contained in the order to show cause. Now that this Court has similarly held that the District Court lacked power to grant the relief requested,
66 there would seem to be no other alternative than to rule against the present application.

As the circumstances of the case are fresh in the minds of the members of the Court, I shall not discuss the details but merely remind the Court: (1) that under the law of New York State the plan of recapitalization is now in effect and that the exercise by appellee of its corporate functions is already seriously embarrassed and will continue to be prejudiced and impaired by any continuance of the restraining order; (2) that appellant's claim that the absence of a continuance of the restraining order would "seriously impair or limit" the performance of its functions under various provisions of the Public Utility Holding

Company Act is not only matter of sheer speculation and conjecture but wholly unsubstantial and without foundation.

The application should be in all respects denied.

CHARLES G. BLAKESLEE.
Charles G. Blakeslee.

Sworn to before me this 8th day of March, 1945.

[SEAL] MARGARET A. HAIR,
Margaret A. Hair,
Notary Public, Bronx County.

67 [File endorsement omitted.]

68 In United States Circuit Court of Appeals, Second Circuit

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Order

Filed March 14, 1945

A motion having been made herein by counsel for appellant to (a) extend the presently operative restraining order heretofore granted to and including final disposition of this case by the Supreme Court of the United States upon a petition for writ of certiorari proposed to be filed on behalf of the Commission, provided that the Commission shall file its said petition within fifteen days of the disposition of this motion by this Court; or (b) to extend the presently operative restraining order heretofore granted by this Court to and including the date of a determination by the Supreme Court of the United States, or a Justice thereof, either granting or refusing to grant a temporary injunction during the pendency before the Supreme Court of said petition for a writ of certiorari upon condition that the Commission shall make application therefor to the Supreme Court, or a Justice thereof, upon notice to appellee, within five days of the disposition of this motion by this Court,

Upon consideration thereof, it is ordered that alternative relief (b) be and it hereby is granted.

ALEXANDER M. BELL, *Clerk.*

70 In United States Circuit Court of Appeals, Second Circuit

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

v.

LONG ISLAND LIGHTING COMPANY, DEFENDANT-APPELLEE

Order for mandate

Filed March 14, 1945

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

72 [Clerk's certificate to foregoing transcript omitted in printing.]

73 Supreme Court of the United States

Order allowing certiorari

Filed March 26, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument during the session of the Court convening April 23.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 49512. U. S. Circuit Court of Appeals, Second Circuit. Term No. 1059. Securities and Exchange Commission, Petitioner vs. Long Island Lighting Company. Petition for a writ of certiorari and exhibit thereto. Filed March 19, 1945. Term No. 1059 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945